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STANDARD-SETTING ACTIVITIES: EVOLUTION OF STANDARDS CONCERNING THE RIGHTS OF INDIGENOUS PEOPLE

Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "indigenous people"

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Introduction

1. At its thirteenth session, the Working Group on Indigenous Populations decided to recommend to the Sub-Commission on Prevention of Discrimination and Protection of Minorities that the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, be entrusted with the preparation of a note on criteria for the definition of indigenous peoples based on information which might be submitted to her by Governments, intergovernmental organizations and indigenous peoples' organizations. 1/

2. The recommendation of the Working Group was subsequently approved by the Sub-Commission in paragraph 3 of its resolution 1995/38 of 24 August 1995.

3. In paragraph 7 of its resolution 1996/40 of 19 April 1996, the Commission on Human Rights took note of the recommendation of the Working Group that the Chairperson-Rapporteur address the concept of "indigenous people" and noted that any work should take into account the views of Governments and organizations of indigenous people. The Commission furthermore requested that the discussion of this issue take place during the fourteenth session of the Working Group, and that the report of the Working Group be transmitted to Governments and organizations of indigenous people prior to the next session of the open-ended inter-sessional Working Group of the Commission established in accordance with resolution 1995/32 to elaborate a draft declaration on the rights of indigenous people.

4. To date, the Chairperson-Rapporteur has received no comments from Governments or organizations of indigenous people regarding the issue of definition. She has been guided, however, in particular by the rich relevant discussions on this conceptual question at previous sessions of the Working Group, and has taken careful note of the extensive exchange of views between Governments and indigenous people at the first session of the open-ended inter-sessional Working Group of the Commission established in accordance with the above-mentioned resolution, which took place in Geneva from 20 November-1 December 1995. 2/ The Chairperson-Rapporteur was fortunately able to participate in the deliberations and to address this Working Group, as an observer and in her capacity as Chairperson-Rapporteur of the Working Group on Indigenous Populations.

5. It should also be noted that the Chairperson-Rapporteur prepared a comprehensive note (E/CN.4/Sub.2/AC.4/1995/3) on criteria which might be applied when considering the concept of indigenous peoples which was submitted

to the Working Group on Indigenous Populations at its thirteenth session. The basic criteria identified in the note included questions relating to historical continuity, distinctive cultural characteristics, traditional lands, non-dominance, self-identification and group consciousness. The Chairperson-Rapporteur also mentioned in the note (para. 7) that the attendance at the Working Group of certain persons describing themselves as "indigenous peoples" had been challenged by other indigenous peoples' representatives in the Working Group.

6. The Chairperson-Rapporteur also raised the question of the desirability of a definition of the concept "indigenous people". She, and others, pointed out that the Working Group itself had been a success despite not having adopted any formal definition of "indigenous people". That forum had none the less become, in the view of almost all the participants, the major meeting point in the United Nations system for representatives of observer Governments, indigenous peoples intergovernmental and non-governmental organizations and other interested individuals, in particular members of the academic family - a real "community of peoples", as the Chairperson-Rapporteur called it. It was also contributing, systematically and constructively, to the promotion, protection and realization of the rights of the world's indigenous peoples.

7. Notwithstanding these observations, the Chairperson-Rapporteur expressed, inter alia, the view that some discussions regarding in particular a further analysis of the concept of "indigenous people" might be desirable both as a response to the growing interest of Governments and indigenous peoples themselves and as a "guide" for the United Nations system, in particular in the field of the implementation of international instruments relating to the promotion and protection of the rights of indigenous peoples.

8. In elaborating the present working paper the Chairperson-Rapporteur also took into consideration the examination of this question by the Special Rapporteur of the Sub-Commission, Mr. M. Alfonso Martínez, in his second progress report on the study on treaties, agreements and other constructive arrangements between States and indigenous populations (E/CN.4/Sub.2/1995/27, paras. 48-129).

9. The following analysis of the concept of "indigenous people" is of a preliminary nature, and has the principal aim of promoting a more focused discussion of this question by the interested parties at the

fourteenth session of the Working Group, as well as at the open-ended working group of the Commission. As further explained below, it is the considered opinion of the Chairperson-Rapporteur that the concept of "indigenous" is not capable of a precise, inclusive definition which can be applied in the same manner to all regions of the world. However, greater agreement may be achieved with respect to identifying the principal factors which have distinguished "indigenous peoples" from other groups in the practice of the United Nations system and regional intergovernmental organizations. The Chairperson-Rapporteur has accordingly devoted a part of this working paper to a historical review of international practice, in an attempt to extract, inter alia, recurring conceptual elements or themes.

I. HISTORICAL REVIEW OF INTERNATIONAL PRACTICE

10. It should be acknowledged at the outset that the international discussion of the concept of "indigenous" evolved, from the late nineteenth century until the establishment of the Working Group in 1982, 3/ within the framework of European languages, notably English, Spanish, and German. English and Spanish share a common root in the Latin term indigenae, which was used to distinguish between persons who were born in a particular place and those who arrived from elsewhere (advenae). The French term autochtone has, by comparison, Greek roots and, like the German term Ursprung, suggests that the group to which it refers was the first to exist in the particular location. Hence, the semantic roots of the terms historically used in modern international law share a single conceptual element: priority in time.

11. A fruitful starting point for the consideration of international practice is the Berlin Africa Conference of 1884-1885, convened by the Great Powers with the aim of agreeing on principles for the assertion and recognition of their territorial claims in Africa. In article 6 of the Final Act of the Conference, the Great Powers made a commitment to the "protection of indigenous populations" of Africa. In this legal context, the term "indigenous" was meant to distinguish between citizens of nationals of the Great Powers and those persons in Africa who were under the colonial domination of the Great Powers. It should be born in mind that there was an implicit element of race in the use of the term "indigenous", as well. When the British Empire subjected the Dutch settlers in South Africa to British rule following the Boer War, for example, it was never conceived that article 6 of the Final Act was applicable to them.

A. League of Nations

12. In accordance with Article 22 of the Covenant of the League of Nations the Members of the League accepted as a "sacred trust of civilization" the duty of promoting the well-being and development of the "indigenous population" of those "colonies and territories" which remained under their control. Hence, the Covenant of the League of Nations also used the term "indigenous" to distinguish between colonial powers and peoples who were living under colonial domination. The Covenant added a second level of qualification, however, characterizing "indigenous populations" as "peoples not yet able to stand by themselves under the strenuous conditions of the modern world", as contrasted to more "advanced" societies. Both factors (that is, colonial domination and institutional capacity) were to be considered, under Article 22 of the Covenant, in determining the degree of supervision that was appropriate to particular territories and peoples.

13. The case of South Africa illustrates the meaning which attached to Article 22 of the Covenant, in the practice of the League. In 1919, South Africa was not yet an independent State. It was still a part of the British Empire and, albeit self-governing in its local or internal affairs, subordinate to the British Parliament in London. Nevertheless, the League entrusted South Africa with a mandate, under Article 22, over the territory and population of Namibia. Within the conceptual framework of the Covenant, Namibia was "indigenous", in contradistinction to the "advanced" character of South Africa. The League did not conceive, however, that the African population of South Africa itself was "indigenous" in relation to recent Dutch and British settlers.

14. It is possible to identify one more important element of the evolving concept of "indigenous" in the case of South Africa. Article 22 of the Covenant was applied to territories, as demarcated by internationally recognized borders, rather than to peoples who could be distinguished by sociological, historical or political factors. Thus, Namibia, as a territory geographically defined by the Great Powers, was deemed to be "indigenous", while the African population within South Africa was not so considered.

B. Pan-American Union

15. Meanwhile, however, the Pan-American Union, as the predecessor of the present-day Organization of American States, had begun to use the "indigenous"

in a rather different manner. In its resolution XI of 21 December 1938, the Eighth International Conference of American States declared:

> "That the indigenous populations, as descendants of the first inhabitants of the lands which today form America, and in order to offset the deficiency in their physical and intellectual development, have a preferential right to the protection of the public authorities".

The objective of this preferential treatment was to be their "complete integration into the national life" of existing States. In this and subsequent official documents of the Pan-American Union, it should be noted that the terms "indigenous" and "Indian" were used interchangeably.

16. As a matter of regional practice in the Americas, therefore, the term "indigenous" was employed to identify marginalized or vulnerable ethnic, cultural, linguistic and racial groups within State borders, rather than the inhabitants of colonial territories that were distinct geographically from the administering Power.

C. Charter of the United Nations

17. The adoption of the Charter of the United Nations in 1945 did nothing to reconcile different usages of the term "indigenous" in international law. Article 73 of the Charter refers to "territories whose peoples have not yet attained a full measure of self-government", rather than "indigenous populations" as that term appears in the Covenant of the League of Nations. It was not until 15 December 1960 that the United Nations General Assembly, in resolution 1541 (XV), defined a "Non-Self-Governing Territory" for this purpose, using a two-tiered test. A territory which is "geographically separate and is distinct ethnically and/or culturally from the country administering it" falls, prima facie, under Article 73. Evidence that the inhabitants suffer a "position or status of subordination" may be advanced to support this presumption, but is not required.

18. It has generally been presumed that the foregoing definition of a "Non-Self-Governing Territory", in respect to Article 73 of the Charter, is also applicable to the definition of "peoples" who are entitled to the exercise of the right of self-determination under common article 1 of the two International Covenants on Human Rights (hereinafter Covenants). However, the significance of the choice of the term "peoples", rather than "territories", by the drafters of the two Covenants should not be minimized. The shift from a geographical conception to a sociological one implies a

broadening of the application of the principle of self-determination to include non-dominant groups within the boundaries of independent States.

19. Consistent with the foregoing analysis of the choice of the term "peoples" in the two Covenants, the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations 4/ prohibits the dismemberment of States "conducting themselves in compliance with the principle of equal rights and self-determination of peoples ... and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour". It would have been unnecessary to make such a qualification unless it was understood that the population of a State could consist of a number of "peoples", each possessing the right of self-determination. As the Chairperson-Rapporteur has analysed in her explanatory note concerning the draft declaration on the rights of indigenous peoples, the right of self-determination may be satisfied where a people enjoys an effective voice, through its own representatives, in the governing of a democratic State, and suffers no disadvantage or discrimination (E/CN.4/Sub.2/1993/26/Add.1, paras. 21-23).

20. After the Second World War, by comparison, the term "indigenous" assumed the meaning it had previously been given by the Pan-American Union, rather than the League of Nations. The General Assembly, in resolution 275 (III) of 11 May 1949, recommended a study of the conditions of the "aboriginal population and other underdeveloped social groups" of the Americas, with a view to promoting their integration and development. Three years later, the Government of Belgium provoked a controversy by arguing that Article 73 of the Charter should be interpreted in the light of the concept of "indigenous" found in Article 22 of the Covenant of the League of Nations. 5/ According to the delegation of Belgium, the reporting obligations of Article 73 applied not only to overseas colonies, but to "backward indigenous peoples" living within the borders of independent States in all regions of the world.

D. ILO Convention No. 107

21. The delegation of Belgium was not successful in bringing the concept of "indigenous peoples" into Article 73 of the Charter, but the ILO adopted the Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 1957 (No. 107). Article 1 of the Convention defines the term "tribal" in terms reminiscent of

the League Covenant: their "social and economic conditions are at a less advanced stage" in comparison with their neighbours, and they live under separate laws, either of their own choosing or imposed by the State. Some "tribal" peoples, moreover, "are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization" and remain socially, economically and culturally distinct.

22. In the terms set forth by Convention No. 107, then, both "tribal" and "indigenous" peoples are mainly characterized by social, cultural, economic, legal and institutional distinctiveness. Evidence of actual oppression or discrimination is not a criterion. The only factor that differentiates "indigenous" peoples from "tribal" peoples is a history of "conquest or colonization", but this distinction is of no practical consequence, since the Convention guarantees both categories of people exactly the same rights. According to Convention No. 107, all "indigenous" peoples are "tribal", but not all "tribal" peoples are "indigenous". Special rights attach equally to both groups. No advantage is gained by virtue of being "indigenous" in the sense of having been a victim, historically, of conquest or colonization. Hence, the source of rights is not (according to this ILO international instrument) a people's history of being conquered, colonized or oppressed, but its history of being distinct as a society or nation.

23. It is noteworthy that Convention No. 107 was not only ratified by 14 States in Latin America and 2 in Western Europe, but also by 11 States in Africa and Asia.

E. Study of the Problem of Discrimination against Indigenous Populations

24. In his monumental Study of the Problem of Discrimination Against Indigenous Populations (E/CN.4/Sub.2/1986/7 and Add.1-4), the Special Rapporteur of the Sub-Commission, Mr. J. Martínez Cobo, offered a cautious, preliminary analysis of the concept of "indigenous" that reflects the fundamental elements already incorporated into article 1 of Convention No. 107.

> "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of

them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems". 6/

25. This combines the element of distinctiveness, which characterizes both "indigenous" and "tribal" peoples according to article 1 of ILO Convention No. 107, with the element of colonialism, which in the Convention No. 107 is employed to differentiate "indigenous" from "tribal".

26. The Special Rapporteur proposed three additional elements for the concept of "indigenous", albeit in a way that suggests that these new elements are neither necessary nor sufficient to clarify a particular group. One element is "non-dominance at present", implying that some form of discrimination or marginalization exists, and justifies action by the international community. It would not follow, however, that a group ceases to be "indigenous" if, as a result of measures taken for the full realization of its rights, it were no longer non-dominant.

27. The Special Rapporteur referred also to the importance to the group of retaining a relationship with ancestral lands or territories, as well as the importance of ensuring that the distinctiveness of the group is voluntary, rather than imposed upon the group by the State. These two points were addressed when the ILO revised Convention No. 107.

F. ILO Convention No. 169

28. ILO Convention No. 107 has been revised and replaced by the Convention on Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169), which in article 1 has retained the distinction between "indigenous" and "tribal" peoples, while modifying the way in which these two terms are defined. 7/ "Tribal peoples" are peoples "whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations". This formulation embraces the factor of "distinctiveness" as it appeared in ILO Convention No. 107, but deletes any implication that tribal peoples are inferior or less "advanced". "Indigenous peoples" are now defined in terms of their distinctiveness, as well as their descent from the inhabitants of their territory "at the time of conquest or colonization or the establishment of present state boundaries" (emphasis

supplied). The addition of the underlined phrase has the effect of minimizing any logical differences between the concepts of "indigenous" and "tribal", since both concepts are now chiefly defined by the extent to which the group in question constitutes a distinct society.

29. The only concrete remaining difference between the definition of "indigenous" and "tribal" in ILO Convention No. 169 relates essentially to the principle of self-determination. A people may be "tribal", either by its own choice (that is, by maintaining its own laws and customs), or without its consent (as a result of special legal status imposed by the State). A people may be classified as "indigenous" only if it so chooses by perpetuating its own distinctive institutions and identity.

30. Even this residual distinction appears to be vitiated by article 1.2 of the Convention, which provides that "self-identification" shall be a fundamental criterion when determining the status of particular groups. 8/ In other words, the only objective or extrinsic criterion of the "indigenous" or "tribal" character of a group is distinctiveness. The remaining criterion is subjective: the choice of the group to be and remain distinct, which is an exercise of self-determination.

31. Like ILO Convention No. 107, moreover, Convention No. 169 accords the same rights to "indigenous" and "tribal" peoples, further eroding the usefulness of distinguishing between these categories of peoples.

32. It may justifiably be stated that, after two rounds of exhaustive negotiations on the problem of definition, first in 1957 and again 1988-1989, the ILO did not achieve greater semantic precision, but on the contrary succeeded only in merging the definition of "indigenous" and "tribal" into a single broad test of distinctiveness.

33. The draft inter-American declaration on the rights of indigenous peoples, prepared by the inter-American Commission on Human Rights for consideration by the General Assembly of the Organization of American States, adopts the conceptual approach of ILO Convention No. 169, defining "indigenous peoples" as descendants of the earliest inhabitants of the country. 9/ Interestingly, however, the draft inter-American declaration suggests that cultural distinctiveness - the central element of the ILO definition of "tribal" - provides an alternative basis for establishing that a group is

"indigenous". If adopted, this instrument would combine "indigenous" and "tribal", as defined in the above-mentioned ILO Conventions, into one concept, with two alternative tests.

34. The United Nations Development Programme (UNDP) has prepared draft guidelines for support to indigenous peoples. 10/ Draft guidelines 4, 5 and 6 refer to the definition of indigenous peoples. In these draft guidelines mention is made, inter alia, to the fact that despite certain characteristics common to the world's indigenous peoples, no single accepted definition of indigenous peoples exists which captures their diversity. Therefore, "self-identification" as indigenous or tribal is usually regarded as a fundamental criterion for determining whether groups are indigenous or tribal, sometimes in combination with other variables such as language spoken and geographic location or concentration. These draft guidelines adopt the definition of ILO Convention No. 169.

G. Indigenous peoples' point of view

35. Indigenous representatives on several occasions have expressed the view, before the Working Group that a definition of the concept of "indigenous people" is not necessary or desirable. They have stressed the importance of self-identification as an essential component of any definition which might be elaborated by the United Nations system. In addition, a number of other elements were noted by indigenous representatives, in particular during the thirteenth session of the Working Group. 11/ For example, the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr. M. Dodson, stated: "there must be scope for self-identification as an individual and acceptance as such by the group. Above all and of crucial and fundamental importance is the historical and ancient connection with lands and territories. ...". A number of other indigenous representatives referred to the working definition developed by the Special Rapporteur, Mr. Martínez Cobo. 12/ The representative of the Sami Council, for example, stated that "even without a definition it should be relatively easy to identify the beneficiaries (of the draft declaration) by using the criteria of the Cobo report which is adequate to determine whether a person or community is indigenous or not. Factors such as historical continuity, self-identification and group membership are cardinal criteria in this regard".

36. As mentioned earlier, indigenous groups insist on their right to define themselves both in terms of an individual's "self-identification" as an

indigenous person and with respect to the community's right to define its members. This "subjective" approach - that indigenous peoples are those who feel themselves to be indigenous and are accepted as such by members of the group - has been widely supported, although it is not clear whether it would be sufficient if other "objective" criteria, such as ancestry, were absent. 13/ The Human Rights Committee, in addressing this question, especially in connection with the Sandra Lovelace case, has found that denial of the legal right of an Indian woman to reside on the Indian Tobique Reserve, in Canada, because of her marriage to a non-Indian violated her right, "in community with the other members of her group", to enjoy her own culture as guaranteed by article 27 of the International Covenant on Civil and Political Rights. The Human Rights Committee did not directly address the issue of whether the author of the communication, Ms. Lovelace, had lost her status as an Indian. Nevertheless, it has implicitly decided that she remained a part of the Maliseet Indian band from which she came. The case of Sandra Lovelace was considered in the light of the fact that her marriage to a non-Indian has broken up. There was no evidence that the above-mentioned Indian band objected to her residing on the reserve. 14/

37. Article 27 of the Covenant has also been invoked by indigenous people. In this respect, it should be mentioned, for example, that in 1980, an Aboriginal delegation addressed the Sub-Commission on the Australian Government's failure to protect a sacred site on Aboriginal leasehold land at Noonkanbah from the Western Australian Government's insistence that exploratory drilling for oil should proceed. 15/ Another case concerning Canadian Indians (communication No. 167/1984, Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada) raised issues before the Human Rights Committee under article 27 of the Covenant with respect to the traditional rights to fishing and hunting, as well as issues of self-determination under article 1 of the Covenant. In its review of this case, the Committee did, inter alia, find a violation of article 27. It recognized "that the rights protected by article 27, include the rights of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong". 16/

38. It should be also mentioned that some indigenous representatives from Asia stated that, in view of the establishment of the new working group of the

Commission on Human Rights, a formal definition was urgently needed to prevent Governments from denying the existence of indigenous peoples in their countries. 17/

H. Views expressed by Governments

39. The representatives of the observer Governments of Bangladesh and India emphasized the need for a clear definition of "indigenous people" in the interest of an effective focus on the true indigenous people of the world. The representative of the observer Government of Bangladesh stated in particular that a procedure based on self-identification could be self-defeating and that it would be a great disservice to the true indigenous people if the agenda for indigenous people were allowed to be confused with the agenda of other subnational and tribal groups that constituted minorities within their respective countries.

I. Views expressed by members of the Working Group

40. Mr. R. Hatano, member of the Working Group, in one of his statements before the Sub-Commission regarding in particular the draft declaration on the rights of indigenous peoples, expressed the following views in connection with the definition of the concept "indigenous people": "... Even if [the declaration] was not a binding legal instrument, it none the less sets out the rights of indigenous peoples and the duties of States towards these peoples. However, nowhere did the declaration define the key expression 'indigenous people'. Apparently, indigenous organizations did not want the term to be defined for fear some indigenous persons would not be covered by the scope of the definition. However, such organizations had repeatedly affirmed that the world's population included approximately 300 million indigenous persons. How had they arrived at that figure without some yardstick or definition to distinguish between indigenous and non-indigenous persons?" 18/

41. Mr. J. Bengoa, alternate member of the Working Group, stated that regarding the development of a concept of indigenous people, the discussion clearly had two sides: a theoretical one and a political one. Also, there was a difficult linguistic problem in view of the usage of the words "populations" and "peoples". The draft declaration which had been approved by the Sub-Commission used both words without making a clear distinction between them. A definition of the concept of "indigenous peoples" could be an important step towards the recognition of indigenous peoples and their rights and could well serve to make the very important distinction between indigenous

groups and minorities. In that regard, the difference between defining peoples and establishing procedures to exercise the right of self-identification should be made. The procedures to exercise the right of self-identification had to have the following characteristics: first, they had to be operational in order to serve international objectives and in particular allow an understanding of the many different cultures; second, they had to be functional to allow participation of the indigenous peoples; third, they had to be flexible in order to be able to respond to new situations in the dynamic process of recognizing indigenous peoples' rights. Mr. Bengoa stressed the fact that the principle of self-identification is inalienable and has to be part of the definition. The characteristic of being the first people and the strong ties to the land also constituted important elements of a possible definition. He pointed out the inherent danger of a requirement of historic continuity, as many indigenous peoples had been forcibly removed from their lands or were now living in urban areas but had kept their indigenous identity. Also, he stated that the element of having been subjected to colonization needed further discussion, as it seemed to reflect mainly the situations faced by indigenous groups in the Americas. The element of distinct culture which was recognized by all existing definitions should not constitute a decisive feature in order to allow for a more dynamic approach, taking into account processes of change in indigenous societies. Furthermore, he regarded the characteristic of non-dominance as an empirical reality but not necessarily a substantive feature. 19/

II. CRITICAL LEGAL ANALYSIS

A. Comparison with "Non-Self-Governing Territories"

42. It will be recalled that in General Assembly resolution 1541 (XV) the Assembly had defined "Non-Self-Governing Territories" in terms of three fundamental factors: cultural distinctiveness, geographic separateness, and actual subordination. The evolving concept of "indigenous" overlaps with the formal definition of "Non-Self-Governing Territories" with respect to the first factor (distinctiveness). We have seen that subordination, while suggested as a possible element of a definition in the Martínez Cobo study, was not included in the definition adopted by the ILO conventions in this field, although marginalization and oppression are unquestionably shared experiences of most indigenous peoples. It does not seem logical, moreover,

that the presence or absence of oppression should be a factor distinguishing indigenous peoples from others heaving experienced so-called classic colonialism.

43. The third factor, geographic separateness, also merits a critical re-examination. The Special Rapporteur, Mr. Martínez Cobo, recognized that indigenous peoples tend to be characterized by their maintaining special relationships with their "ancestral territories". Although ILO Convention No. 169 does not include any geographical factor in its definition of "indigenous", it none the less affirms, in article 13, the "special importance" of the continuing relationship between indigenous peoples and their ancestral territories for continuing their "cultures and spiritual values". In other words, the cultural distinctiveness of indigenous peoples, which is central to the concept of "indigenous" in contemporary international law, is inseparable from "territory".

44. The inseparability of cultural distinctiveness and territory from the concept of "indigenous" was noted by the United Nations Conference on Environment and Development in paragraph 26.1 of Agenda 21, adopted by a consensus of Member States:

> "Indigenous people and their communities have a historical relationship with their lands and are generally descendants of the original inhabitants of those lands". 20/

45. The centrality of land tenure systems and ecological knowledge to the cultures of indigenous peoples was reaffirmed, again by consensus, at the International Conference on Population and Development at Cairo in 1994. 21/

46. The World Bank Operational Manual also identifies "a close attachment to ancestral territories and to the natural resources in these areas" as one of five factors which, in varying degrees, tend to characterize "indigenous peoples". 22/

B. Comparisons with "minorities"

47. Acknowledging the significance of "territory" may be necessary to address another major logical and conceptual problem: differentiating "indigenous peoples" from "minorities". A strict distinction must be made between "indigenous rights" and "minority rights". Indigenous peoples are indeed peoples and not minorities or ethnic groups. 23/

48. The Permanent Court of International Justice (P.C.I.J.) did not define the concept "minority" but made an attempt to provide the meaning of the concept of "community" in the Greco-Bulgarian Communities case as follows:

> "... a group of persons living in a given country or locality having a race, religion, language and traditions of their own, and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, securing the instruction and upbringing of their children in accordance with the spirit and tradition of their race and mutually assisting one another. 24/

49. The above-mentioned formula contains four main elements: (a) biological distinctiveness; (b) cultural distinctiveness (religion, language, traditions); (c) the choice or desire to remain distinct (which may be implied in the perpetuation of the cultural distinctiveness of the group); and (d) social cohesiveness (which may be implied from the fact that the group seeks a recognition of its collective rights). The racial factor is, of course, no longer admissible as a matter of law or science.

50. The meaning of the concept of "minority" provided by the P.C.I.J. may therefore be collapsed into the same concept that lies at the heart of all recent attempts to define "indigenous" - that is, a distinctiveness which the people concerned wish to perpetuate.

51. In his important Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, the Special Rapporteur of the Sub-Commission, Mr. F. Capotorti, argued that the size and power of a group are important considerations in determining whether it should be an object of special international protection. A "minority" from the viewpoint of sociology, he reasoned, is not necessarily the same as a "minority" within the context of international human rights law. From his perspective, he proposed the following definition:

> "A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language. 25/

52. Thus defined, a group must not only lack political power, but lack the numerical strength ever to gain power through democratic means, before it qualifies as a "minority". An oppressive group that constitutes a numerical minority of the national population would, accordingly, not qualify as a "minority", but in such as case the State concerned would not be entitled to invoke national unity and territorial integrity against legitimate national liberation movements.

53. At the request of the Sub-Commission, Mr. J. Deschênes made a great effort to improve upon the definition of "minority" but reached essentially the same conclusions as Mr. Capotorti. He suggested one refinement that merits our attention, however. This was to place greater weight on the element of choice, since there would seem to be no need to be concerned with groups that did not wish to be protected, or to maintain their distinct identity as groups. 26/

54. In a more recent study, the Special Rapporteur of the Sub-Commission, Mr. A. Eide, was also inspired by the definition proposed by Mr. Capotorti, although he concluded that the size of the group and its distinctiveness are sufficient as tests of its character as a minority, thereby abandoning the element of non-dominance. 27/

55. At its first session in 1995, the new Working Group on Minorities of the Sub-Commission considered the possibility of elaborating a more precise definition of "minority" but the debate merely underscored the futility of such an endeavour, and the Working Group proceeded to discuss practical means of protecting minorities without agreeing on a definition. 28/

56. At the second session of the Working Group on Minorities a member, Mr. S. Chernichenko, presented a working paper on the definition of minorities (E/CN.4/Sub.2/AC.5/1996/WP.1 and Corr.1), in which he proposed a new definition of minorities. In this respect, he emphasized, inter alia, that his definition did not extend to indigenous populations and that the tasks of the Working Group on Minorities did not include the development of any definition of indigenous populations (para. 7).

57. The Human Rights Committee in its General Comment No. 23 (50) (art. 27) observes that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, specially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law". 29/

In any event, the "working definition" included in the Capotorti study does not help distinguish between the concepts of "indigenous" and "minority" since most groups that regard themselves as indigenous peoples could satisfy its tests.

58. The task of clarifying the concept of "indigenous" is accordingly complicated by the fact that the United Nations has previously failed to devise reasonably precise definitions of "peoples" or "minorities". 30/

59. Since the three concepts "indigenous", "peoples" and "minorities" are logically and legally related, it would be necessary to refine all of them simultaneously, lest our efforts to clarify the concept of "indigenous" add to the existing uncertainty in the meaning of the other related concepts.

C. The search for factors specific to "indigenous"

60. It is none the less possible to identify at least two factors which have never been associated with the concept of "minorities": priority in time and attachment to a particular territory. These factors do not, however, help to distinguish between the concept of "indigenous" and the concept of "peoples", since "peoples" are also ordinarily identified with a distinct territory to which they have a claim of historical precedence. In other words, it is possible to find points of differentiation between "indigenous" and "minority", but not between "indigenous" and "peoples", based upon the efforts of international organizations to define these terms in this century.

61. This is an appropriate stage at which to review the discussion of these issues by participants at the first meeting of the working group of the Commission on Human Rights which was established by resolution 1995/32. Several delegations of Member States maintained that it was essential to adopt a definition of the concept "indigenous" before negotiating the substantive provisions of a declaration on the rights of these people. Some delegations, moreover, reasoned that the concept of "indigenous" is applicable only to situations in which the original inhabitants of the territory were subjugated and physically dispossessed by settlers from overseas, bearing alien cultures and values, and where these settlers, rather than the original inhabitants, have been the real beneficiaries of decolonization and independent statehood. These circumstances, the same delegations contend, have largely been restricted historically to the Americas and Oceania.

62. Further, in adopting its report, the working group stipulated that it was "solely a record of the debate and does not imply acceptance of the usage of

either expression 'indigenous peoples' or 'indigenous people'. In this report both are used without prejudice to the positions of the particular delegations, where divergences of approach remain" (E/CN.4/1996/84, para. 3).

63. The advisability and feasibility of adopting a definition of the concept of "indigenous" may reasonably be judged from the conceptual framework proposed by concerned delegations. The definition which has been suggested differs in only one concrete aspect from the conceptual model presented in the Martínez Cobo study or the two ILO conventions in this field: conquest, colonization, subjugation or discrimination must be at the hands of persons from other regions of the world rather than neighbours. In the opinion of the Chairperson-Rapporteur, this makes an unjustified distinction between long-distance aggression and short-distance aggression, and it is logically impossible to establish a cut-off distance. Moreover, it assumes that the cultural differences that exist between peoples is a simple linear function of distance, such that mere proximity creates a presumption of shared values. The information provided to the Working Group on Indigenous Populations each year contradicts the validity of that assumption.

64. Underlying the arguments made by many observer Government delegations is a conceptual critique of the use of the term "indigenous" to distinguish between groups that have been neighbours for millennia. To the extent that the English and Spanish terms which are currently in official use in the United Nations system imply a distinction between persons originating in a country, as opposed to immigrants or settlers, the unease of many African and Asian Governments is understandable. Plainly, most of the persons who have control of the contemporary State are not less native to the soil of the country as a whole than groups that are identified as "indigenous" or "tribal". It should be pointed out, however, that this conceptual difficulty disappears if we think of "indigenous" peoples as groups which are native to their own specific ancestral territories within the borders of the existing State, rather than persons that are native generally to the region in which the State is located.

65. The purpose of the present document is not to minimize the concerns expressed by some Governments, but to demonstrate that their concerns cannot effectively be met through an exercise in definition. The result of undertaking such an exercise would be a definition which lacked any scientific

or logical credibility, thereby undermining (in turn) the credibility and usefulness of the declaration of principles to which it was attached.

III. CONCLUSIONS AND RECOMMENDATIONS

66. It is an encouraging fact that Governments in the Latin American region have expressed confidence in their understanding of the meaning of "indigenous" in their own regional context, rendering an explicit, negotiated definition of this concept largely unnecessary. The Chairperson-Rapporteur is cognizant of the fact that, even in the Americas, disputes have often arisen regarding the "indigenous" status of particular groups. Within the United States, for example, more than 100 groups are still seeking formal acknowledgement of their status as "Indian tribes", under a 1978 law identifying seven historical and sociological criteria applicants must satisfy with scientific evidence. 31/

67. In practical terms, then, it would be foolhardy to disregard both the regional and the national dimensions of the concept of "indigenous". Regional research and consultations would be extremely useful for this purpose and, in the future, differences in practice must be recognized as long as they are broadly consistent with regional and international expert opinion. Where disputes occur, they should be addressed in the same way as other disputes involving both factual and legal issues in the field of human rights, that is to say, through a constructive dialogue between expert bodies and the representatives of indigenous peoples and Governments.

68. At its second and third sessions, the Working Group on Indigenous Populations discussed the definition of the concept of "indigenous" at great length, using the work of the Special Rapporteur as a point of departure. 32/ No consensus was reached, but indigenous people who participated in these discussions stressed the need for flexibility and for respecting the desire and the right of each indigenous people to define itself. From that time the Working Group has indeed adopted a flexible approach to determining eligibility to participate in its annual sessions, relying upon organizations of indigenous peoples themselves to draw attention to any improper assertions of the right to participate as "indigenous" peoples. On the whole, this has been successful, and shows that the gradual evolution of the concept of "indigenous" in practice, and in cooperation with

indigenous peoples themselves, is sufficiently practical and effective as a method of screening the claims of groups whose legal character may be challenged.

69. In summary, the factors which modern international organizations and legal experts (including indigenous legal experts and members of the academic family), have considered relevant to the understanding of the concept of "indigenous" include:

(a) Priority in time, with respect to the occupation and use of a specific territory;

(b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;

(c) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and

(d) An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.

70. The foregoing factors do not, and cannot, constitute an inclusive or comprehensive definition. Rather, they represent factors which may be present, to a greater or lesser degree, in different regions and in different national and local contexts. As such, they may provide some general guidance to reasonable decision-making in practice.

71. The United Nations system should be mindful of the conclusion of the managers of the World Bank that "no single definition can capture (the) diversity" of indigenous peoples worldwide. 33/ It would also be wise to heed the words of the Special Rapporteur, Mr. Capotorti, who warned that precise universal definition, while of philosophical interest, would be nearly impossible to attain in the current state of global realities, and would in any event not contribute perceptibly to the practical aspects of defending groups from abuse. 34/

72. In presenting this analysis, the Chairperson-Rapporteur wishes to stress that she can find no satisfactory reasoning for distinguishing between "indigenous" and "tribal" peoples in the practice or precedents of the United Nations. Nor is she persuaded that there is any distinction between "indigenous" peoples, and "peoples" generally, other than the fact that the

groups typically identified as "indigenous" have been unable to exercise the right of self-determination by participating in the construction of a contemporary nation-State.

73. The Chairperson-Rapporteur is compelled to conclude that any inconsistency or imprecision in previous efforts to clarify the concept of "indigenous" was not a result of a lack of adequate scientific or legal analysis, but due to the efforts of some Governments to limit its globality, and of other Governments to build a high conceptual wall between "indigenous" and "peoples" and/or "Non-Self-Governing Territories". No one has succeeded in devising a definition of "indigenous" which is precise and internally valid as a philosophical matter, yet satisfies demands to limit its regional application and legal implications. All past attempts to achieve both clarity and restrictiveness in the same definition have in fact resulted in greater ambiguity.

74. The only immediate solution, based on the experience of the Working Group on Indigenous Populations, is a procedural one: we must ensure that the eventual implementation of a declaration on the rights of indigenous peoples is entrusted to a body which is fair-minded and open to the views of indigenous peoples and Governments, so that there is room for the reasonable evolution and regional specificity of the concept of "indigenous" in practice.

Notes

1/ E/CN.4/Sub.2/1995/24, para. 162.

2/ See E/CN.4/1996/84.

3/ The creation of the Working Group on Indigenous Populations was recommended by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in its resolution 2 (XXXIV) of 8 September 1981, endorsed by the Commission on Human Rights in its resolution 1982/19 of 10 March 1982, and authorized by the Economic and Social Council in its resolution 1982/34 of 7 May 1982.

4/ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

5/ See A/2361 (1952).

6/ E/CN.4/Sub.2/1986/7/Add.4, United Nations Publication, Sales No. E.86.XIV.3, para. 379.

7/ In connection with the definition employed in ILO Convention No. 169, see, I. Brownlie, "Treaties and Indigenous Peoples". The Robb Lectures, F.M. Brookfield (ed.), Clarendon Press, Oxford, 1992, pp. 60-67. For an analysis of the provisions of this Convention, see R.L. Barsh, "An Advocate's Guide to the Convention on Indigenous and Tribal Peoples", 15 OKLAHOMA UNIVERSITY LAW REVIEW 209 (1990), L. Swepston, "A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No 169 of 1989", 15 OKLAHOMA UNIVERSITY LAW REVIEW 677 (1990) and S.J. Anaya, "Indigenous Rights Norms in Contemporary International Law", Arizona Journal of International and Comparative Law, vol. 8, No. 2, Fall 1991, pp. 6-15.

8/ So formulated, art. 1.2 of ILO Convention No. 169 provides that "self-identification" should be given great weight, although it is not sufficient in itself.

9/ OEA/Ser/L/V/II.90, Doc. 9 rev. 1 (21 September 1995).

10/ Guidelines for Support to Indigenous Peoples, United Nations Development Programme, Draft V , January 1995. These draft Guidelines should be adopted by the Executive Board of UNDP.

11/ See E/CN.4/Sub.2/1995/24, para. 41-51.

12/ Ibid., para. 29-32.

13/ See H. Hannum, "New Developments in Indigenous Rights", Virginia Journal of International Law, vol. 28, No. 3, Spring 1988, p. 663.

14/ Communication No. R.6/24, Sandra Lovelace v. Canada, in Official Records of the General Assembly, Thirty-sixth session, Supplement No. 40 (A/36/40), annex XVIII. For a comprehensive analysis of the relevant Views, expressed by the Human Rights Committee, see G. Alfredsson and A. de Zayas, "Minority Rights: Protection by the United Nations", Human Rights Law Journal 26 February 1993, vol. 14, No. 1-2, pp. 5-6.

15/ H. McRae, G. Nettheim and L. Beacroft, Aboriginal Legal Issues, The Law Book Company Limited, Sydney, 1991, p.320.

16/ Ibid., Forty-fifth session, Supplement No. 40 (A/45/40), vol. II, annex IX, para 32.2.

17/ E/CN.4/Sub.2/1995/24, para. 41.

18/ E/CN.4/Sub.2/1992/SR.31/Add.1, para. 36.

19/ See E/CN.4/Sub.2/1995/24, paras. 45-51.

20/ Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-4 June 1992), vol. I, resolution 1, annex II. United Nations Publication, Sales No. E.93.I.8. See also chapter 26 of Agenda 21 on "Recognizing and strengthening the role of indigenous people and their communities".

21/ A/CONF.171/13, para. 6.27.

22/ Operational Directive 4.20, para. 5 (a), September 1991. Other factors listed are self-identification, a distinct language, customary social and political institutions, and a subsistence-oriented economy.

23/ E.-I. A. Daes, "On the Relations Between Indigenous Peoples and States", Without Prejudice, vol. III, p. 44.

24/ See Greco-Bulgarian Communities (Advisory Opinion), P.C.I.J. Series B, No. 17, p. 22 (31 July 1930). In this respect, see also P. Thornberry, "The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update", Universal Minority Rights, A. Phillips and A. Rosas (eds.), Abo Akademi University Institute for Human Rights, 1995, pp. 16-17.

25/ F. Capotorti, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, United Nations publication, Sales No. E.91.XIV.2, Geneva, 1991, para. 568.

26/ E/CN.4/Sub.2/1985/31, paras. 74 and 181.

27/ E/CN.4/Sub.2/1993/34, para. 29.

28/ E/CN.4/Sub.2/1996/2, paras. 76-90.

29/ CCPR/C/21/Rev.1/Add.5. See in particular para. 7.

30/ For an analysis of the meaning of the concepts "indigenous", "peoples" and "minorities", see M.N. Shaw, "The Definition of Minorities in International Law", Israel Yearbook on Human Rights, vol. 20 (1991) pp. 13-43; E.-I.A. Daes, "Some Considerations on the Right of Indigenous Peoples to Self-Determination", Transnational Legal and Contemporary Problems, vol. 3 (1993), pp. 2-11; Daes, "Dilemmas Posed by the UN Draft Declaration on the Rights of Indigenous Peoples", Nordic Journal of International Law, 63:205-212 (1994); Daes, "The United Nations Declaration on Minority Rights: Necessary, Urgent and Overdue", International Geneva Yearbook, vol. IX, 1995, in particular pp. 91-92; R.L. Barsh, "Indigenous Peoples in the 1990s: From Object to Subject of International Law?", Harvard Human Rights Journal, vol. Seven, Spring 1994, in particular pp. 36-41 and 78-82; D. Sanders, "Indigenous Peoples at the United Nations" (on file with the author), September 1995, pp. 1-17; G. Alfredsson, "Group Rights, Preferential Treatment

and the Rule of Law", Discussion Paper for Consultation on Group Rights at the University of Cambridge, Law and Society Trust, Colombo, August 1995, p. 21.

31/ See W.C. Canby, Jr., American Indian Law (second edition), St. Paul, Minn., West Publishing Co., 1988, pp. 5-8.

32/ E/CN.4/Sub.2/1983/22, paras. 109-119; E/CN.4/Sub.2/1984/20, paras. 99-110.

33/ World Bank Operational Manual, op. cit., Operational Directive 4.20 (1991).

34/ Capotorti, op. cit., paras. 561-562.

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Sub-Commission on Prevention
of Discrimination and
Protection of Minorities
Working Group on Indigenous Populations
Fourteenth session
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Item 4 of the provisional agenda

STANDARD-SETTING ACTIVITIES: EVOLUTION OF STANDARDS CONCERNING THE RIGHTS OF INDIGENOUS PEOPLE: THE CONCEPT OF "INDIGENOUS PEOPLES"

Information received from indigenous peoples' organizations

Addendum

ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION

[Original: ENGLISH]
[11 June 1996]

A definition of "indigenous peoples"?

Introduction

1. The Aboriginal and Torres Strait Islander Commission, an indigenous organization in consultative status with the Economic and Social Council, believes that certain definitional issues, particularly those relating to the meaning of "indigenous peoples", in the draft declaration on the rights of indigenous peoples and the proposed permanent forum for indigenous peoples, are matters which should be determined by the world's indigenous peoples themselves.

Is there a need for a definition of "indigenous peoples"?

2. Deciding upon an unequivocal definition of "indigenous peoples" as a prerequisite for advancing the work of the Working Group on Indigenous Populations on the draft declaration is unnecessary. Nor should the present lack of a watertight definition be an impediment to the establishment and operation of a permanent forum. As indicated at the first session of the working group of the Commission on Human Rights held in Geneva in November/December 1995, and elsewhere:

Central concepts in international human rights instruments are often not defined;

The United Nations generally refrains from attempting tight definitions, which may limit the flexibility of Governments and peoples in applying relevant instruments to their own national circumstances;

No definition of "minorities" was arrived at for the work of the United Nations on minorities, although Commission on Human Rights resolution 1984/62 sought a definition;

Other instruments, such as the Rio Declaration - Agenda 21, refer to indigenous peoples' participation in environmental issues, without defining those peoples.

3. Early settlement of definitional terms may well exclude significant groups from enjoyment of such rights as may be accepted in the draft declaration. Clearly there is no need to reach a precipitate determination of the meaning of "indigenous peoples" in an abstract definition.

4. It is sufficient to found the role, legitimacy and mandate for the continued development of the draft declaration by the working group of the Commission on Human Rights, and for the establishment of a permanent forum to deal with the interests of all the world's indigenous peoples, that peoples exist who are unequivocally acknowledged as indigenous. Some are acknowledged as such by their own sovereign States, and attend United Nations forums as indigenous representatives, either within State delegations, or as indigenous NGOs. Others are invited to attend as indigenous parties by the United Nations. Resolutions of the Commission on Human Rights clearly acknowledge their existence, without resort to a definition, and endorse the legitimacy of their continued participation in its work.

Recognition of "indigenous peoples"

5. Two steps hitherto were involved in recognition of the legal status of an "indigenous people".

Self-identification;

Recognition by an international sovereign entity, or institution.

6. Various States have used domestic definitions for indigenous groups, referring to them by their own distinctive names or tribes. Identification was also settled under international law when paramount States entered into treaties at settlement, often acknowledging them as "dependent nations", as in the United States of America or Canada, or at the conclusion of wars, or for the maintenance of borders. As domestic courts and international institutions have acknowledged those arrangements, indigenous identity is widely acknowledged.

Australian domestic definitions

7. "Aboriginal" is a technical term applied to the indigenous peoples of Australia, and other lands, and means "from the beginning". In effect, it acknowledges such peoples as the "first peoples" of any particular region or place. The term "autochthones" also means "people originating with the land", and articles of the draft declaration attempt to restore significance and vitality to these concepts.

8. Australia has not committed itself with finality to any conclusive definition of "indigenous peoples" in domestic or international law. Domestic legislation works basically to broad pragmatic formulas which aim at conferring, rather than limiting, individual rights and entitlements. Of two alternative definitions the more interesting, from the High Court of Australia, is found in Commonwealth of Australia and Anor. v. State of Tasmania (1983) 46 ALR 625 at 817. It states:

> "By 'Aboriginal Australian' I mean ... a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognized by the Aboriginal community as an Aborigine." (Dean J.)

9. These criteria, which allow indigenous peoples to set the standards for self-identification and recognition of those who are indigenous, reflect the continuing practice of many sovereign jurisdictions, and accord with principles of international law. They are also found in the 1983 Cobo definition.

The problem of an all-inclusive international definition

10. In searching for suitable meanings in international law for "indigenous peoples", both words must be addressed, i.e., the indicia which distinguish "peoples", and a legal meaning for "indigenous". Ample working definitions exist to deal with both issues. The International Meeting of Experts' Final Report on the Further Study of the Rights of Peoples (UNESCO: SNS - 89/CONF.602/7) 1990, offered a provisional working definition for:

> "A people for the [purpose of the] rights of people in international law, including the right to self-determination".

11. The Working Group has used, and should continue to use, the Cobo working definition for "indigenous peoples". The Cobo formula and ILO Convention No. 169 concerning Indigenous and Tribal Peoples (1989) definition both acknowledge self-identification and self-recognition as essential aspects in

defining indigenous peoples. Both models are useful, and despite the fact that ILO Convention No. 169, at article 1.3 has the caveat: "The use of the term 'peoples' in this Convention shall not be construed as having any implication regarding the rights which may attach to the term under international law", this is severable for a working definition and other purposes. It is also clear from the drafting history of ILO Convention No. 169, that that disclaimer was not part of the original version, but was a subsequent amendment to make the Convention more universally acceptable.

Continued use of the word "peoples"

12. There should be no rational objection to the use of "peoples", either for the draft declaration, or the permanent forum. The word "peoples" in conjunction with "indigenous" already features in an existing international instrument, ILO Convention No. 169. The words can be read conjunctively as including peoples who are both tribal and indigenous, or disjunctively, as a convention relating to "tribal peoples" and to "indigenous peoples". The proviso at article 1.3 clearly indicates that the second reading is intended, otherwise there would have been no purpose in adding the proviso. As article 3 of the draft declaration proposes self-determination for indigenous peoples, the use of "peoples" in the declaration's title cannot be objected to as intensifying that claim.

Elements in defining "indigenous peoples"

13. Any definition should address recognition of:

The right of indigenous peoples to self-identify as such;

The meaning implicit in the terms "indigenous" and "aboriginal peoples";

The consequent rights of primogeniture as "first peoples";

The rights which this implies in relation to land, self-determination and culture;

The right to accept others into groups classed as indigenous or aboriginal; and

The right to determine finally the indicia and definition for "indigenous peoples".

14. In summary:

Historically, central concepts in human rights instruments are often not defined;

The customary right, sanctioned by State practice and in international law, for indigenous peoples, or indeed for any peoples, to determine the criteria for their own identity should be defended; and

Premature proposals to reach conclusive definitions at this stage should be resisted.